

**IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE**  
**THIRTIETH JUDICIAL DISTRICT AT MEMPHIS**  
**DIVISION V**

ORIGINAL

STATE OF TENNESSEE,

VS.

VERN BRASWELL,

Defendant.

CASE NO. 05-03038

FILED 3-1-07  
 WILLIAM R. KEY, CLERK  
 BY [Signature] D.C.

SENTENCING HEARING  
 January 6, 2006

*(Supplement approved  
 by Criminal Court of  
 Appeals)*

THE HONORABLE JOSEPH B. DAILEY

APPEARANCES

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1                   IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE  
2                   THIRTIETH JUDICIAL DISTRICT AT MEMPHIS  
3                   DIVISION V

4       STATE OF TENNESSEE,                   )  
5       VS.                                    )       CASE NO. 05-03038  
6       VERN BRASWELL,                    )  
7       Defendant.                         )

8  
9                   This cause came on to be heard and was heard on  
10                  the 6th day of January, 2006, at 11:00 A.M., before the  
11                  Honorable Joseph B. Dailey, Judge, holding the Criminal Court  
12                  for Shelby County at Memphis, Tennessee.

13                  The following proceedings were had, to-wit:

14  
15                                   \* \* \* \* \*

16  
17                  THE COURT: Are you ready to go forward on Vern  
18                  Braswell?

19                  MR. BAILEY: I'm ready to go forward, Your Honor.

20                  THE COURT: Alright. Bring out Vern Braswell,  
21                  please.

22                  (Complied.)

23                  Proceed, Ms. Carnesale.

24                  MS. CARNESALE: Yes, Your Honor. Mr. Braswell was  
25                  found guilty back in December of murder in the second degree,

1 which is an A felony. The State has filed a Notice of  
2 Enhancement factors. The State alleges that the defendant is  
3 within Range 1 standard offender which as Your Honor knows  
4 carries to twenty-five years.

5 We've also indicated that the defendant has a  
6 previous history of criminal convictions or criminal behavior  
7 in addition to those necessary to establish his range. A  
8 Pre-Sentence Report bears that out. Mr. Braswell has two  
9 prior misdemeanor convictions, one is a theft of property  
10 under \$500 from 1992, the second was an aggravated assault  
11 that he pled to misdemeanor assault from 1990. He received  
12 six months sentence with six months probation.

13 And we're going forward based on those two  
14 convictions. We don't have any proof other than I'd like to  
15 call Ms. Pearline Washburn. She has submitted a letter that  
16 she wrote as part of the victim impact statement, part of the  
17 sentencing report. She'd like to read that to the Court with  
18 Your Honor's permission.

19 MR. BAILEY: I have no problem with that. I just  
20 want to ask the Court does -- I do have some objections to the  
21 use of those convictions as enhancement factors. Would Your  
22 Honor just rather we just hold til argument or did you want to  
23 hear -- Your Honor want to hear it now?

24 THE COURT: I'll hear from you now.

25 MR. BAILEY: Alright. Your Honor, after reading

1 the Reform Act of 1989 and likewise after reviewing the -- for  
2 the record State vs. Edwin Gomez, which Your Honor's familiar  
3 with, but it's cited at 163 SW 3rd 632; also the Decision of  
4 State of Tennessee vs. Royce Dino Lane which is not reported  
5 in the SW 2nd Reporter, but cited as 1992 West Law 120.89; and  
6 finally the McConnell Decision that the State of Tennessee vs.  
7 McConnell -- actually it's McConnell vs. the State of  
8 Tennessee, which was a second degree murder case.

9 All of these I've cited with the exception of  
10 Gomez is a second degree murder case. And this case is cited  
11 at 12 SW 3rd 795. The Court, the Supreme Court of the State  
12 of Tennessee and the Tennessee Criminal Court of Appeals has  
13 now reached out through the Gomez case and adopted the  
14 provisions, although they say it's not a new rule or principle  
15 of law but they're simply restating a principle of law.

16 But they've adopted the Decision as stated by the  
17 United States Supreme Court in the Blakley Decision. And  
18 essentially it says that the factual findings -- and I'll get  
19 to the other two issues -- but the factual findings with  
20 regards to enhancements of the sentence beyond the -- a  
21 presumptive sentence which is in the middle of the range have  
22 to be done by the jury. It's as simple as that.

23 Now, it does give the Court discretion, but in the  
24 use of that discretion if I may just quote the Court -- it  
25 says that Your Honor is to utilize that which is in the

1 record, those facts which are in the record, but it also says  
2 that the requirements of the Sixth Amendment are clear, that  
3 the application of Washington sentencings which was the  
4 Blakley Decision -- violated the defendant's right to have the  
5 jury find the existence of any particular fact that the law  
6 makes essential for his punishment.

7 And quoting the Blakley Decision we have the  
8 Booker Decision, which is 125 Supreme Court 749. Says the  
9 Court in Booker concluded accordingly we affirm in Gomez, we  
10 affirm our holding in a prendre any fact -- and then it says  
11 "other than a prior conviction," and I'm going to come back to  
12 that.

13 Any fact other than a prior conviction which is  
14 necessary to support a sentence exceeding the maximum  
15 authorized by the fact established by a plea of guilty or jury  
16 verdict must be admitted by the defendant or approved by a  
17 jury beyond a reasonable doubt. And in Gomez and in the other  
18 cases -- oh, I'm sorry, in the other cases which cite Gomez,  
19 which are second degree murder cases, it sets a presumptive  
20 sentence at twenty years.

21 And Your Honor knows that, but for the record a  
22 presumptive sentence is twenty years. It's at the mid-point  
23 range.

24 Now, the Reform Act of 1989 does not contemplate  
25 the use of misdemeanor convictions. A Class A misdemeanor

1 which was some thirteen years ago and another Class A  
2 misdemeanor which was the assault charge which is almost --  
3 this April will be sixteen years ago -- and nothing since then  
4 to enhance a felony conviction by a jury -- doesn't  
5 contemplate that.

6 In fact, I think the Sentencing Commission  
7 specifically in their comments talk about using prior  
8 convictions, a felony, to enhance.

9 THE COURT: Let me see what you're referring to.  
10 Does it preclude the use of misdemeanors?

11 MR. BAILEY: No, it does not preclude it. I'm not  
12 stating that to the Court, but their discussion -- and I'll  
13 just pass this forward -- their discussion in the matter, you  
14 know, clearly in my opinion indicates that the Court is  
15 presuming or the Sentencing Commission presumed that -- excuse  
16 me one second, Judge, I have it here somewhere -- that the  
17 Sentencing Commission presumed the use of felonies as a  
18 enhancement factor.

19 A assault charge that happened, I think -- and  
20 Your Honor heard about this assault charge when we were having  
21 the bond hearing, that happened on the University of Memphis  
22 campus in 1990, in April of 1990, that -- and the theft of  
23 property, which I don't know the facts regarding the theft of  
24 property, which occurred -- which occurred in 1992 -- that's  
25 not what I'm looking for -- anyway those -- the Court -- I

1 don't think that the Sentencing Commission nor any court that  
2 I know of, any Decision, any major Decision that I know of has  
3 utilized or presumed the use misdemeanors over ten years old  
4 to enhance the sentence.

5 THE COURT: I've used them on many occasions. I  
6 don't know anything in the law that precludes the use of  
7 misdemeanors or that sets a ten year time bar.

8 MR. BAILEY: Well, I granted the Court -- granted  
9 Your Honor that --

10 THE COURT: I'll be happy to look at such law if  
11 you point me to it but --

12 MR. BAILEY: I'm trying -- I had a stack of --

13 THE COURT: -- I'm unaware of any law.

14 MR. BAILEY: And, again, what I'm passing to the  
15 Court I agree with the Court.

16 THE COURT: Obviously a felony that occurred a  
17 year ago would carry more weight than a misdemeanor that  
18 occurred sixteen years ago, but I know of nothing in the law  
19 that precludes a Court from considering misdemeanors, even  
20 thirteen and sixteen year old misdemeanors.

21 MR. BAILEY: And I agree with the Court. I said I  
22 don't think it precludes it, but I think that when you read  
23 the Sentencing Commission's comments that I don't think that  
24 that's what's considered. That's my point, and I don't think  
25 that that was the Legislative's intent behind it.



1 But other than that I'd also state to the Court  
2 that we, of course, we have -- we understand the Victim Impact  
3 Statement and that Ms. Washburn is here to testify so, of  
4 course, we have no comments with regard to that. I want to  
5 just also state to the Court that I've discussed with Mr.  
6 Braswell his testifying today, and he will not testify today.

7 THE COURT: Well, look, I assume that this line  
8 that you have underlined, the sentence that you have  
9 underlined is that to which you refer on the second page  
10 talking about prior felony convictions, but that's talking  
11 about enhancing to a different range of punishment --

12 MR. BAILEY: I understand.

13 THE COURT: -- altogether.

14 MR. BAILEY: I understand.

15 THE COURT: Not for -- not for enhancing within a  
16 range. That's two separate things.

17 MR. BAILEY: Alright. But I'm thinking to the  
18 Court that in order to -- in order to abridge the presumption  
19 I believe that the Sentencing Commission --

20 THE COURT: You're talking about two different  
21 things. If you want to move from Range 1 to Range 2 to Range  
22 3 to career then you have to rely on appropriate felonies, of  
23 course. We all understand that.

24 MR. BAILEY: Yes, sir.

25 THE COURT: And that's what this is referring to,

1 this line that you have underlined in here. But if you're  
2 talking about enhancing within a range there's nothing in the  
3 law that I'm aware of nor has there ever been that would  
4 preclude the consideration of misdemeanor convictions for that  
5 purpose.

6 In fact, it doesn't even have to be a conviction,  
7 it can be criminal behavior. And I don't believe the Blakley  
8 language in Gomez would have any bearing at all. It  
9 specifically culls out this prior conviction factor as one --  
10 as a Blakley consideration at all.

11 MR. BAILEY: Well, I actually was using -- I went  
12 ahead and just made my full argument with regard to the Gomez  
13 and Blakley factors, not with regards to the prior convictions  
14 but just in anticipation of other factual findings that Your  
15 Honor might make in determining the sentence. I want to go  
16 ahead and go on the record on that.

17 THE COURT: Right.

18 MR. BAILEY: And I would state to the Court that  
19 the recent Decision of Tate and also McConnell say that if I  
20 don't make that argument it's waived specifically.

21 THE COURT: Yes, sir, I understand.

22 MR. BAILEY: Okay.

23 THE COURT: Alright. Call your witness.

24 MS. CARNESALE: Thank Your Honor. The State would  
25 call Pearline Washburn.

1 Whereupon,

2 PEARLINE WASHBURN

3 was called as a witness herein and, after first having been  
4 duly sworn, was examined and testified as follows:

5 THE COURT: Have a seat, please.

6 DIRECT EXAMINATION

7 BY MS. CARNESALE:

8 Q Good morning.

9 A Good morning.

10 Q Would you please state and spell your name for the  
11 record?

12 A Pearline Washburn, P-e-a-r-l-i-n-e,  
13 W-a-s-h-b-u-r-n.

14 Q And, Ms. Washburn, you understand that we're here  
15 today for the sentencing hearing in the matter of Vern  
16 Braswell in his conviction of second degree murder, is that  
17 correct?

18 A Yes.

19 Q You're the mother of Sheila Braswell, the victim  
20 of the murder, is that right?

21 A Yes.

22 Q And I understand that you wrote a letter in  
23 response to the Probation Officer's request for a Victim  
24 Impact Statement. Do you have a copy of that letter with you  
25 today?

1 A Yes.

2 Q At this time would you like to read that into the  
3 Court and into the record?

4 A Yes.

5 MS. CARNESALE: Your Honor, we'd ask permission.

6 THE COURT: You may.

7 THE WITNESS: "...On Friday, November 5th, 2004, a  
8 tragedy occurred. Sheila Braswell's life was snatched from  
9 this earth, not by a stranger but by her husband. The first  
10 record of occurrence of her death Sheila was found floating in  
11 the bathtub. The second record of occurrence was Saturday,  
12 November 6th, 2004, manual strangulation.

13 It was very difficult to function not knowing the  
14 truth and trying to digest two days of hurt, betrayal, anger,  
15 frustration and accept death. Our family's very small in  
16 numbers but our extended family is extensive and strong in  
17 faith.

18 Sheila was a good wife. She shared the birth of  
19 two boys with their marriage. Numerous activities were  
20 planned around the boys. They attended family gatherings  
21 locally and out of the city. During her busy schedule she  
22 managed to clean, wash and complete other house cleaning  
23 chores. Sheila was responsible for Vern completing his  
24 undergraduate and graduate degrees at Memphis State  
25 University.

1           After Vern's betrayal as a husband Sheila  
2 continued to maintain her daily routine and care for her  
3 family. Sheila was a good mother, and her life was centered  
4 around the well being of her boys. She made sure they got  
5 their homework, cooked wholesome meals and disciplined as  
6 necessary.

7           She read bedtime stories and exposed them to  
8 travelling out of town by automobile, air and train. The boys  
9 completed Tae Kwon-Do classes, ran track, and both boys played  
10 Pee-Wee's football. She would sit in the heat, cold and rain  
11 during practice. The 2004 Pee-Wee team went undefeated and  
12 won the championship division one week after Sheila's death.

13           She did not get the opportunity to cheer them on.  
14 Both boys attended the banquet and received trophies. Sheila  
15 enjoyed sports from high school and played softball through  
16 2001. Sheila took her boys to church, served as president of  
17 the PTA at Hallie (phonics spelling) Elementary, adoptive  
18 school coordinator at Cummings Elementary; several years a  
19 member of our church ministry, a member of the (inaudible)  
20 club, always helping and making a difference in someone's  
21 life.

22           Sheila was my daughter, my confidante, my friend  
23 and my prayer partner. We talked almost every day and often  
24 saw her during the week to make bank deposits. She was a  
25 beautiful thirty-two year old woman that had everything going

1 for her. She had a big heart, enjoyed improving the quality  
2 of life for her family, friends and patients.

3 She was strong mentally, physically and  
4 spiritually. She was intelligent, wore a big smile, and could  
5 be heard from quite a distance. It was very difficult to  
6 sitting through the court proceeding re-living Sheila's death,  
7 very painful observing exhibits, listening to the tapes,  
8 listening to the forensic evidence and other witnesses.

9 I fear the day her boys will have to learn the  
10 truth about their mother's death and how their father tried to  
11 present such heinous acts to paint an ugly image and destroy  
12 Sheila's reputation as a good mother and a good woman. Sheila  
13 loved her stepfather and would often ask for advice and  
14 guidance.

15 When she told us she had filed for her divorce in  
16 June of 2004 his advice to her was be careful and be  
17 prayerful. They often told jokes and short tales. Sheila's  
18 relationship with her father was unique. Their bond allowed  
19 them to have differences of opinion but knew where they stood  
20 with one another. She was very close to her grandparents who  
21 gave her solid advice and shared words of wisdom, which many  
22 she applied in her daily life working with patients and  
23 co-workers.

24 Positive attitudes and patience will go a long  
25 way. They depended on Sheila to get them to the grocery

1 store, doctor's appointments, checking their blood pressure,  
2 blood sugar, providing ongoing therapy and exercise for her  
3 grandmother who had both knees replaced.

4 Sheila's death has left a gigantic hole in their  
5 hearts, and to see and listen to the court hearings have added  
6 to their hurt and pain. Their recovery process is very slow.  
7 Her Uncle Ralph, mentally challenged, encouraged Sheila to  
8 become an occupational and physical therapist. She wanted to  
9 help people with disabilities. She was motivated to help  
10 those that had low or no self esteem and lacked the ability to  
11 help themselves.

12 Sheila was close to her brother. He was referred  
13 to as her big and only brother. Growing up he was a  
14 protective brother and she was a protective sister. Their  
15 birthdays were two years and one day apart, August 27th and  
16 August 28th. Usually they celebrated their birthdays  
17 together. They attended the same schools, elementary and high  
18 school, and they had so much in common and respected each  
19 other.

20 She protected and placed a shield around her  
21 brother from knowing what she was encountering in her  
22 marriage. Her big brother and sister-in-law have stepped in  
23 the role of guardianship to raise her boys with love, dignity  
24 and honor.

25 At the age of twenty Sheila helped care for her

1 adopted brother who was, at that time, two. She was a full  
2 time student at Shelby State College and managed to get him to  
3 and from day care and complete her studies. Not too many  
4 people would have done what she did to help the family bond  
5 and work as a family unit.

6 Again, she was always concerned and caring of  
7 others. Sheila was that type at an early age at Metropolitan  
8 Baptist Church and loved her church family. As a young child  
9 the church provided tutorial programs at the school,  
10 (inaudible), sports, bowling and other reading programs. She  
11 grew up in the Sunday schools, youth choirs and made Adults  
12 For Christ Choir and had a melodious voice.

13 She had a special relationship with the Lord and  
14 it was evidence because she carried herself in a manner that  
15 she knew -- that you knew she knew the Lord. During the month  
16 of September, 2004 she enrolled in a thirty-two week  
17 discipleship class at the church and was enjoying learning  
18 more about the Bible and the fellowship of her class  
19 participants.

20 Many patients of Sheila's attended her funeral on  
21 walkers, crutches, wheelchairs, and walking canes. They told  
22 us over and over again Sheila was responsible for their  
23 development and were going to miss her smile and small  
24 stature, because of her confidence in them to become mobile  
25 and self-sufficient.



1 She had a special patient almost like her own son.  
2 She cared for him from age two until age six. She provided  
3 therapy three times a week and sometimes beyond her scheduled  
4 hours. Her dream was to see him walk in her lifetime. Her  
5 patient made his first step a week before Sheila's death.  
6 They celebrated this milestone with tears and dancing.

7 Once a month I receive a telephone call from one  
8 of Sheila's patients in Mason, Tennessee. He shares his  
9 concern and how Sheila has faith in him to walk again after a  
10 serious auto accident that doctors stated he would not walk  
11 again. The odds were in his favor and he was blessed with a  
12 good therapist. He misses her very much and refers to her as  
13 his angel.

14 They have no idea how many people have been  
15 affected by Sheila's death, and most of all William and Miles.  
16 They are the real victims. They are confused and emotionally  
17 traumatized. Their mother has been snatched and they have  
18 missed the intimacy of them cuddling in her arms, longing to  
19 be held for comfort and encouragement, baptism, school trips,  
20 teenage years, sports, science projects, hobbies, girlfriends,  
21 prom dates, learning to drive, graduation from high school and  
22 college, marriage and their future families.

23 We will never know how many lives could have been  
24 saved or limbs restored to become flexible again, nor how many  
25 souls would have been saved during Sheila's lifetime. She

1 chose the right profession because her giving spirit and  
2 asking for nothing in return.

3 Whatever the legal systems deems appropriate at  
4 this time so shall it be done.

5 MS. CARNESALE: Thank you. Your Honor, the State  
6 has no further proof.

7 MR. BAILEY: No questions.

8 THE COURT: Alright. You may step down. Thank  
9 you.

10 (The witness was excused.)

11 Any further proof?

12 MS. CARNESALE: No, Your Honor.

13 THE COURT: Alright. Any proof, Mr. Bailey?

14 MR. BAILEY: Your Honor, in the interest of  
15 judicial economy there were several letters that we had --  
16 that were filed actually with Judge Bennett prior to the  
17 matter being indicted and sent to Your Honor's court and was  
18 made a part of the technical record during our bond hearing.

19 I'd ask the Court to take judicial notice of  
20 those, and if the Court chooses to read them into the record I  
21 can, but Your Honor can take a look at that there were --

22 THE COURT: You're right, let me make sure they're  
23 in here.

24 MR. BAILEY: If not there were two files and I  
25 want to make sure the Court knows that.

1 THE COURT: Yes, there are many letters in here  
2 that I recall from the bond hearing having been introduced.

3 MR. BAILEY: And I'll just state to the Court that  
4 since they are already a part of the record we'd ask the Court  
5 to take note of them.

6 THE COURT: I will.

7 MR. BAILEY: Those -- and just for the record it  
8 would be our position that those came from a cross section of  
9 the community, although it was during -- for purposes of bond  
10 they speak to the character and the work of Mr. Braswell in  
11 his local community.

12 Also I'll ask the Court since we did have a very  
13 extensive bond hearing, we put on quite a few witnesses that  
14 the Court has already heard from, his employer who's Ms. Ruby  
15 Payne, Doctor Ruby Payne, and several other people with regard  
16 to those same things, Mr. Braswell's character and his work in  
17 the community, we'd ask the Court to take note of that.

18 THE COURT: I will.

19 MR. BAILEY: With that said, as I stated earlier,  
20 I have discussed with Mr. Braswell his right to be heard  
21 during this hearing. Mr. Braswell, for the record, did  
22 testify at trial and as a result he's going to waive his right  
23 to be heard today.

24 THE COURT: Alright, and you have no additional  
25 proof?

1 MR. BAILEY: No additional proof in addition to  
2 that.

3 THE COURT: Alright. Ms. Carnesale, I'll hear any  
4 arguments you care to make.

5

6

\* \* \* \* \*

7

8

CLOSING ARGUMENT OF STATE

9

BY MS. CARNESALE:

10 Your Honor, the Court heard all the testimony at  
11 trial and the State would submit that there was testimony  
12 regarding prior criminal behavior of the defendant, not  
13 limited to only to the two prior misdemeanor convictions that  
14 we do have on the Pre-Sentence Report.

15 Mr. Braswell, it was elicited at trial, both with  
16 Sheila Braswell, the victim, as well as other women had a  
17 violent history, he had choked both Ms. Braswell and Ms.  
18 Christy Woods in the past. He had assaulted the victim in the  
19 past and the State would ask that Your Honor take that into  
20 consideration as an enhancement factor based on the factor  
21 we've selected.

22 We understand that he's Range 1, and obviously the  
23 Court is aware that -- start a presumptive twenty year  
24 sentence we're asking that the Court move Mr. Braswell to the  
25 maximum twenty-five years. So we would certainly ask the

1 Court to find if the maximum is inappropriate that we enhance  
2 it beyond the presumptive twenty years based on his past  
3 criminal behavior as well as his prior convictions.

4

5

\* \* \* \* \*

6

7

CLOSING ARGUMENT OF DEFENSE

8

BY MR. BAILEY:

9

10 I'm going to submit on the issue of mitigation, as  
11 I've just stated on what's in the technical record, however,  
12 with regards to enhancements I will bring to the Court's  
13 attention that's why I was making my argument earlier about  
14 some -- Gomez and the cases that I've already cited that in  
15 order to utilize the proof that counsel has stated with regards  
16 to acts against the witness, Ms. Christy Woods, and also  
17 allegedly acts were put into the record with regards to prior  
18 assault behavior against the victim in this matter I think that  
19 requires a factual finding that Mr. Braswell's unreasonably  
dangerous.

20 And I think that unless that was specifically put  
21 to the jury I disagree that that could be used as an  
22 enhancement factor based on the Gomez Decision, Gomez, a  
23 prendre and Blakley.

24 THE COURT: Well, I don't know where you're getting  
25 that but the excerpt from Gomez that you just read into the

1 record ten minutes ago specifically excludes these factors as  
2 requiring an a prendre or a Blakley type consideration.

3 Do you have Gomez there?

4 MR. BAILEY: I do. I'll pass it forward. I have  
5 it in full. In fact, let me just go ahead and pass forward the  
6 cases I've cited.

7 THE COURT: Sure.

8 MR. BAILEY: In case Your Honor wants to take a  
9 look at those. Those are all the cases I cited.

10 (Complied.)

11 THE COURT: Well, in looking back through Gomez I  
12 don't see anything in here that supports your conviction --  
13 your contention. I disagree with it. I think that the Supreme  
14 Court in this Opinion written by Chief Justice Drowota clearly  
15 distinguished the State law from the Federal law, and  
16 apparently in this case, once again, our State Attorney  
17 General's Office concedes error there only to be told by the  
18 Court that no, we're not going to accept your concession of  
19 error, you're wrong it wasn't error.

20 That's happened so many times, but notwithstanding  
21 the white flag waved by the State Attorney General's Office the  
22 Supreme Court concluded that our sentencing system does not  
23 violate the Blakley principles since our guidelines are  
24 advisory only. They do not set up a definite grid by which --  
25 by which we must -- to which we must adhere when we sentence.

1           The discretionary, the advisory and beyond that the  
2 challenge really was to factual issues the defendant felt  
3 should have been resolved by a jury, not the prior convictions.  
4 That wasn't even really at issue.

5           So for all those reasons I just don't think that  
6 Blakley or any form of Blakley argument would apply in this  
7 case, so I do think that as this -- as the enhancement factors  
8 specifically set out in the wording of the Enhancement Factor  
9 No. 2 the prior convictions as well as prior criminal behavior  
10 would be applicable for my consideration in determining what  
11 the appropriate sentence is.

12           The Enhancement Factor reads: The defendant has a  
13 previous history of criminal convictions, not felony  
14 convictions, not felony convictions within the past ten years,  
15 but criminal convictions or criminal behavior, not behavior  
16 within the past ten years or not behavior that results in a  
17 felony conviction, but criminal behavior in addition to those  
18 necessary to establish the appropriate range. And, of course,  
19 Range 1 no prior convictions are required, so any prior  
20 criminal behavior would apply.

21           MR. BAILEY: May I, just for the record, then make  
22 this argument with regards to the section of the Tennessee  
23 Statute that -- that specifically says "Criminal Behavior."

24           I'll state to the Court that on behalf of Mr.  
25 Braswell I believe that that's unconstitutional, that it

1 violates his right to confrontation in light of the fact that  
2 if it's behavior that he's not been convicted of then he has  
3 not had an opportunity to confront his accuser, to have a jury,  
4 those due process rights both procedural and substantive.  
5 whereby he can confront his accuser and have a jury decide his  
6 innocence or guilt.

7           And for them to be used in a "sentencing scheme"  
8 then it presumes guilt. When the law, I think, and the  
9 Constitution, both Tennessee and the United States Constitution  
10 presumes innocence. And so I'll just make that argument for  
11 the record.

12           Also, let me just state this before I sit down.

13           THE COURT: Okay.

14           MR. BAILEY: That -- and I'm not objecting to the  
15 hearing today but, again, if I don't make the objection now  
16 it's waived. We only received our Pre-Sentence Report today,  
17 and although I did go through it with the defendant and I  
18 didn't find anything in that period of time in going through  
19 that was objectionable.

20           THE COURT: Are you asking for a continuance to  
21 review it further? I'll be glad to grant that if you want  
22 that.

23           MR. BAILEY: I'm not -- I understand that Your  
24 Honor would, but I'm not. But I just want to make that -- make  
25 it known for my own protection too, okay?



1 THE COURT: Okay, alright. In --

2 MR. BAILEY: Also --

3 THE COURT: Okay, go ahead.

4 MR. BAILEY: Also -- well, that'll be saved for a  
5 different time.

6 THE COURT: Okay. And with regard to your argument  
7 on criminal behavior would you consider his dishonest testimony  
8 at the bond hearing to be under oath to be criminal behavior  
9 that I could consider?

10 MR. BAILEY: Yes.

11 THE COURT: Okay.

12 MR. BAILEY: I think anything that the defendant  
13 says on the stand is something that Your Honor has a right to  
14 consider well within all the principles of law that we've just  
15 read.

16

17 \* \* \* \* \*

18

19 **SENTENCING**

20 BY THE COURT:

21 Alright. Okay. Well, of course, Mr. Braswell,  
22 unlike many defendants that come through court is a well  
23 educated man that had a responsible job in the community. He,  
24 in many ways, led a productive life. That was testimony that  
25 came out during the bond hearing, during the trial, and is

1 borne out by the numerous letters that were submitted on his  
2 behalf. So I acknowledge all that, and that's on this side of  
3 the ledger.

4           However, on the other side of the ledger is a  
5 heinous offense as found by the jury. And, of course, we  
6 haven't had the motion for new trial yet, but I do think and  
7 I'll state now that I think that there was more than ample  
8 proof on which the jury could base its decision. So I think  
9 the jury has settled that issue and it was, indeed, a heinous  
10 offense that required considerable effort and -- well,  
11 considerable effort on your client's part to commit, and that  
12 was followed up by some very defective and questionable conduct  
13 on his part as borne out by the proof in the bond hearing and  
14 the trial.

15           And I think as well this isn't an enhancement  
16 factor but that just as listed statutorily but just as an  
17 observation there's been little of what I would consider to be  
18 genuine remorse expressed in this case. Notwithstanding his  
19 conduct on the witness stand during the trial I think if one  
20 were to listen to those tapes of those phone calls from the  
21 jail one would have to question the degree of remorse that your  
22 client exhibited with regard to this offense.

23           But with regard to the actual enhancement factor  
24 that was listed he clearly does have these two prior  
25 convictions. They're not recent but they are, nonetheless,

1 prior convictions, and very relevant convictions. The assault  
2 which began as an aggravated assault was pled out, apparently  
3 as a simple assault, is obviously very relevant to this type of  
4 an offense.

5           The theft of property involving the dishonesty that  
6 any theft was involved is very relevant in my opinion to his  
7 conduct after this offense was committed, and to his testimony,  
8 his dishonest testimony, from the witness stand during the bond  
9 hearing. All that sort of the prior conviction validates the  
10 sort of deceptive statements that were made during the bond  
11 hearing and at other times, and so I am concerned by the prior  
12 convictions and behavior that he exhibited since this case has  
13 been in this court.

14           And the law, of course, does require that the  
15 punishment in any offense be commensurate with the seriousness  
16 of the crime and the facts of the case. Therefore, considering  
17 all of the factors in this matter on both sides of the ledger,  
18 if you will, I am sentencing Mr. Braswell to serve a period of  
19 twenty-four years in the State Penitentiary.

20  
21                           \* \* \* \* \*

22  
23           MR. BAILEY: Your Honor, with regard to the motion  
24 for new trial I was going to -- we had talked about having that  
25 today. I called Ms. Carnesale a few days ago, and I'm

1 preparing for a trial that starts this Monday and it's just  
2 been impossible with all the proof that we had to do that, so  
3 I'll just reduce it to writing and have it another time if  
4 that's okay with the Court.

5 THE COURT: That's fine. February 10.

6 MR. BAILEY: That's fine.

7 THE COURT: Sure.

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11 \*\*\* (11:45 A.M. - END OF REQUESTED PROCEEDINGS.) \*\*\*

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CERTIFICATE

ORIGINAL

STATE OF TENNESSEE )  
COUNTY OF SHELBY )

I, the undersigned, Bettye Ann Kee, Court Reporter  
for the Thirtieth Judicial District of the State of Tennessee,  
do hereby certify the foregoing to be a true, accurate and  
complete transcript, to the best of my knowledge, understanding  
and ability of all the evidence that was heard in this cause in  
Division V of the Criminal Court for Shelby County, Tennessee,  
before the Honorable Joseph B. Dailey, Presiding Judge, on the  
6th day of January, 2006.

I do further certify that I am neither of kin,  
counsel nor interest to any party hereto.

Dated this 4th day of March, 2006.



My Commission Expires:

December 13, 2008

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